SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 478

AMALGAMATED FOOD EMPLOYEES UNION LOCAL 590, *et al.*,

Petitioners,

—v.—

LOGAN VALLEY PLAZA, INC. and WEIS MARKETS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union is a private, non-profit, non-partisan organization engaged solely in the protection of the Bill of Rights. It files this motion because the respondent has denied the ACLU's request that it consent to the filing of a brief amicus curiae. Respondent's letter has been filed with the Clerk of the Court.

We move for leave to file this brief because we believe that this case presents important questions which relate directly to the extent to which the right to picket is protected by the First Amendment. The right to picket is perhaps the most traditional form of expression, and the one most easily available to groups with limited financial

resources. It has long been recognized by this Court as a form of expression protected by the First Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940).

The extent of the right to picket is put to a new test in the case at bar. The case is an example of one question raised by the force of economic concentration, namely, whether a business organization can insulate itself from what it considers a disagreeable form of expression by asserting that its property rights are paramount to its opponents' speech rights. We believe they cannot and wish to file the attached brief in order to set forth our reasons.

Respectfully submitted,

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus

The interest of amicus is set forth in the motion for leave to file, *supra*.

Statement of Facts

Petitioner, Amalgamated Food Employees Union Local 590 (hereinafter Union), seeks to overturn an order of the Supreme Court of Pennsylvania, three Justices dissenting, affirming a *nisi prius* decree enjoining all picketing at and trespassing on the private property of respondent Logan

Valley Plaza, Inc. The injunction was originally issued *ex parte* by the Court of Common Pleas of Blair County on December 27, 1965. The Union moved to dissolve the injunction. After an evidentiary hearing the Court of Common Pleas denied the Union's motion and entered an order on February 14, 1966 "making permanent the injunction as previously decreed." The facts upon which the injunction was issued are briefly as follows:

Logan Valley Mall is a newly developed shopping center, situated in Logan Township near the city of Altoona, Pennsylvania, at the intersection of two public highways. It is approximately 1.1 miles around its perimeter, and contains a number of stores and other enterprises. At the time of the events in this case it was occupied by Sears Roebuck and Company, which operated a department store and a service station, and by respondent Weis Markets, Inc. The Weis property consists of a modern building with an open but covered porch running along the front and a pick-up zone directly along the porch. There are extensive parking lots to the east and south of the store, and there are also pedestrian ways. The nearest entrance from the highway is approximately 350 feet from the Weis property and the main shopping center entrance is 450-500 feet away.

Weis opened for business on December 8, 1965, employing an entirely non-union staff. Beginning on December 17, 1965, groups of between five and seven men and women walked back and forth in front of Weis, primarily in the pick-up zone, carrying placards which advised the public that Weis was non-union and identifying themselves as members of the Amalgamated Food Employees Union Local 590, the petitioner herein. The picketing was peaceful and unaccompanied by either threats of disorder or

disorder. Weis' assistant general manager told the pickets that they were trespassing, and ordered them to picket on the highway. After the injunction issued, petitioner began to picket on the highway's edge at four entrances. When the highway picketing began, the picketers began to give out handbills urging the public not to patronize non-union markets.

ARGUMENT

I.

Prohibition of peaceful picketing in a public or quasi-public place abridges the First Amendment.

This case concerns the right of individual citizens to engage in peaceful picketing designed to inform their fellow citizens of conditions involving a labor dispute, and to influence their conduct through the communication of this information.

The right to speak freely, to inform, and to dissent, is a basic right. Picketing is but one of the ways in which the right is exercised. Thus *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963) characterized an orderly demonstration involving more than 150 picketers protesting segregation on the South Carolina State House grounds as "an exercise of these basic constitutional rights [of speech, assembly, and petition for redress of grievances] in their most pristine and classic form."

Had the conduct enjoined in the present case occurred on publicly owned streets and sidewalks, it would have unarguably fallen within the protection of the First and

Fourteenth Amendments. Traditionally the public streets, parks, and meeting places have been recognized as places in which the exercise of First Amendment rights is proper and fitting, not only because they are held in trust for all citizens, but also because they are usually places where large numbers of fellow citizens can be reached. These sites are the "natural and proper places for the dissemination of information and opinion." *Schneider* v. *State of New Jersey*, 308 U. S. 147 (1939); *Hague* v. *C. I. O.*, 307 U. S. 496, 515, 516 (1939). Similarly, when privately owned property is in fact fulfilling a governmental function, the right to free expression on that property must be recognized. As this Court stated in *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1946):

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. . . ."

The *Marsh* holding is clearly applicable to the instant case. Respondents are in fact the "government" of this commercial land area. They have chosen to open their property to the general public for the purposes of trade. Petitioners sought only to impart information concerning that trade to respondents' invitees.[1] Under the circumstances, respondents' admitted right to enjoy the use of their property must yield to the requirements of the First Amendment.

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[1] The public nature of shopping centers is further developed in Point II, *infra*.

Since *Marsh*, the "preferred position" of free speech and effective expression has been more clearly delineated. Professor Emerson emphasized the fundamental importance of "the right of all members of society to form their own beliefs and communicate them freely to others" as "an essential principle of a democratically organized society." It plainly follows, as Emerson observes, that "The principles [of a system of free expression] must be continually reshaped and expanded to meet new conditions and new threats to its existence." Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L. J. 877, 883 (1963).

In earlier years when a factory had one gate, it was reasonable to require those with grievances against the management to picket outside that gate or on the public way. Today, however, such restrictions would be artificial because only a small proportion of workers would be reached.[2] The same problem is present in this case. More and more of the retail trade of the country is located in "shopping center cities", which function both as the "governments" of these commercial areas, and as quasi-private

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[2] This Court has recognized the difficulties of communication in the analogous situation of the enforcement of a so-called "non-solicitation rule" against union organization on an employer's property. As this Court wrote in *National Lab. Rel. Bd.* v. *Babcock and Wilcox Co.*, 351 U. S. 105, 112 (1956):

> "When the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."

In *National Lab. Rel. Bd.* v. *United Steelworkers*, 357 U. S. 357 (1958), this Court also noted that a "showing that the non-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees" was "a vital consideration in determining the validity of the non-solicitation rule." 357 U. S. at 363.

no-man's land between the public way and the grocery store.[3] To restrict the picketers to the publicly owned pavement favors property rights over the picketer's free speech rights. It is cold comfort to the union man fighting for the right to bargain collectively, to the Negro fighting for a job, to the housewife fighting an inexplicable rise in the price of eggs, to know that they can effectively picket the neighborhood candy store, but can only wave from the horizon at the vast accumulation of capital nestled inside a shopping center. Shopping centers are where the action is, and picketing the security guards at the edge of the parking lot is an exercise in futility.

In general, both the means of communication and available audiences have become increasingly concentrated. The independent newspaper is becoming extinct; in most cities, all daily papers are under a single ownership. In broadcasting, the dangers of concentration of ownership were early recognized by the Federal Communications Commission, whose Rule 3.636, commented on in *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956), included a blanket prohibition against the ownership of or "direct or indirect" interest in more than five television stations by one person or company. Television stations, far from expressing divergent viewpoints, all too frequently present no viewpoint at all. These centripetal forces are illustrated by the pending acquisition by the International Telephone and Telegraph Company of the American Broadcasting Company.[4] In sum, rather than a system of open com-

[3] See statistics on the growth of shopping centers cited at pp. 31-32 of petition for certiorari.

[4] The validity of the merger is pending before the U. S. Court of Appeals for the District of Columbia in *United States* v. *Federal Communications Commission*, No. 21147.

munication in which diversity of opinion is the rule, the system approaches a closed market place in which only a "single point of view with minor variations, can find an outlet." Emerson, *op. cit. supra* at 953.

> "Today ideas reach millions largely to the extent they are permitted entry into the great metropolitan dailies, news magazines, and broadcasting networks. The soap box is no longer an adequate forum for public discussion. Only the new media of communication can lay sentiments before the public, and it is they rather than government who can most effectively abridge expression by nullifying the opportunity for an idea to win acceptance. As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1655-1656 (1967).

Without enormous financial resources, a person or an association of persons is confined to picketing, handbilling, and similar personal demonstrations in the attempt to communicate with the public, and the effort to secure public notice through the media. As this Court has observed, "Peaceful picketing is the workingman's means of communication." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 275, 293 (1941). If their efforts are not to be entirely futile, then the First Amendment must be construed in a way that will both permit and encourage the most expansive use of the limited forms of communication available to petitioner and others in similar circumstances.

Respondents contend that because the state court injunction did not prohibit picketing altogether, but merely moved

it some 350 feet away to the highway, petitioner's First Amendment rights were not infringed. Respondents' Brief in Opposition, p. 6. Such an argument ignores both the realities of the situation and the requirements of the First Amendment. First Amendment rights can and should be exercised in the place where they will be most effective. As this Court has stated:

> ". . . [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, 308 U. S. 147, 163 (1939).

The individual or individuals exercising First Amendment rights may also choose the most effective time, *Mills* v. *Alabama*, 384 U. S. 214 (1966), and manner in which they can be most effective, *Saia* v. *New York*, 334 U. S. 558 (1948); *Kovacs* v. *Cooper*, 336 U. S. 77, 87 (1949); see *Williams* v. *Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mandatory injunction authorizing a 45 mile protest march on a public highway by civil rights demonstrators from Selma to Montgomery, Alabama).

As Mr. Justice Black has stated:

> I cannot accept . . . [the] view that the abridgement of speech and the press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgement strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop. *National Lab. Rel. Bd.* v. *Fruit and*

Vegetable Packers, 377 U. S. 58, 79-80 (1964) (concurring opinion).

This rationale is equally applicable here. It is true that all motorists must enter the shopping center through one of five entrances, and that all motorists would, therefore, have to pass picketers if they were stationed at every entrance. Such a view, however, ignores the obvious fact that motorists traveling at a substantial speed and exiting from a highway will, hopefully, be watching the road, the exit itself, and the painted lanes which serve as roads across the parking lot. Under such circumstances, there is hardly the time for communication of any message, let alone contemplation of it. Under respondents' argument, the picketers might as well be required to remove themselves to the town of Altoona itself.

II.

The shopping center in the case at bar is public for purposes of the application of the First and Fourteenth Amendments.

There is no question that the shopping center involved in the instant case is dedicated to the public use and therefore subject to the application of the First and Fourteenth Amendments. *Marsh* v. *Alabama, supra.* In determining whether any particular location is public in this sense, the courts look to constitutional principles rather than the law of property. See *Wolin* v. *Port of New York Authority*, 268 F. Supp. 855 (S. D. N. Y. 1967) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City); *People* v. *Collins*, 16 N. Y. 2d 554 (1965), affirming 44 M: 2d 430, 254 N. Y. S. 2d 182 (App. T. 2d Dept.

1964); *Farmer* v. *Moses*, 232 F. Supp. 154 (S. D. N. Y. 1964) (exercise of First Amendment rights inside the New York World's Fair Grounds); *People* v. *Dews*, New York Law Journal, June 16, 1967, p. 16 (App. Term, 1st Dept.) (not off. rep.) (exercise of First Amendment rights inside the Port Authority bus terminal, New York City).

A shopping center, by definition and purpose, is a place open to all members of the public to view and to buy merchandise and to obtain services of various kinds. The stores within the shopping center invite all citizens to come, to look, and to buy. The concourses and sidewalks within the shopping center function as thoroughfares for pedestrians just as public sidewalks function for shoppers in stores fronting on public streets. The shopping center parking lots provide a place not only where vehicles may be left while their owners walk through the center, but also provide what are in effect access roads from the highway to the shops themselves. In actual fact, the modern shopping center differs from the traditional town shopping area only in the happenstance that title to the land is privately held, a fact which is probably unknown and of little or no concern to the many thousands of persons who visit it.

The essentially public nature of the modern shopping center has been recognized by many courts in a number of contexts. In a suit for an injunction by a union, the Michigan Supreme Court held that management's interference with the union's distribution of handbills on a shopping center sidewalk was a violation of the First and Fourteenth Amendments. *Amalgamated Clothing Workers* v. *Wonderland Shopping Center*, 370 Mich. 542, 122 N. W. 2d 785 (1963). The Supreme Court of California similarly upheld

peaceful picketing inside a shopping center, *Schwartz-Torrance Investment Corp.* v. *Bakery Workers Local No. 31*, 40 Cal. Rptr. 233, 394 P. 2d 921, *cert. den.* 380 U. S. 906 (196). See also *Freeman* v. *Retail Clerks Union*, 58 Wash. 2d 426, 363 P. 2d 803 (1961); *Moreland Corp.* v. *Retail Store Employees Union Local 444*, 16 Wis. 2d 499, 114 N. W. 2d 876, 879 (19); *Maryland* v. *Williams*, 55 L. R. R. M. 2357 (Md. Crim. Ct. 1959).

CONCLUSION

For the reasons set forth above, the decision of the Court below should be reversed.

Respectfully submitted,

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